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IN THE
COURT OF APPEALS OF INDIANA

JACKIE WEEKLY HABEGGER,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 17A03-0612-JV-560
	)	
DIVISION OF FAMILY & CHILDREN,	)	
	)	
Appellee.	)	

APPEAL FROM THE DEKALB SUPERIOR COURT
The Honorable Monte L. Brown, Judge
Cause No. 17C01-0409-JT-16 TRANSFERRED TO 17D02-0601-JT-2

June 22, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Jackie Habagger ("Mother") appeals the trial court's involuntary termination of her parental rights with respect to A.H., a minor child. Mother raises one issue for our review, which we restate as whether the DeKalb County Office of the Indiana Department of Child Services ("DCS") failed to provide her with proper notice of the termination hearing pursuant to Indiana Code Section 31-35-2-6.5.

We reverse.

FACTS AND PROCEDURAL HISTORY

On August 31, 2006, the trial court ordered the involuntary termination of Mother's parental rights with respect to A.H. In that order, the court entered the following factual findings:

> 2. That [A.H.] was removed from her parents and taken into emergency detention and custody on May 15, 2003. . . .
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> 3. That on August 11, 2003, [A.H.] was adjudged to be a Child in Need of Services ["CHINS"].
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> 4. That on September 22, 2004, the DCS filed its Petition For Involuntary Termination Of the Parent/Child Relationship in the DeKalb Circuit Court, Cause Number 17C01-0409-JT-016, which case was transferred to this Court . . . on January 3, 2006.
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> * * *
>
> 15. That on January 7, 2005, [Mother] appeared in the DeKalb Circuit Court in Cause Number 17C01-0409-JT-016, together with counsel, Hugh N. Taylor, at which time [Mother] acknowledged that she reviewed the Petition For Involuntary Termination Of Parental Rights and that her counsel had reviewed the appropriate statutes with her and fully advised her of her rights and the potential consequences concerning said Petition . . . .

16. That by Court Order dated March 23, 2005, the trial on the Petition For Involuntary Termination of Parental Rights was scheduled for March 21 and 22, 2006, beginning at 8:30 A.M.

17. That [Mother] received notice of the March 21 and 22, 2006[,] trial date.

18. That on November 14, 2005, [Mother], by counsel . . . filed her Motion to continue the March 21 and 22, 2006[,] trial date, which Motion was granted by Order dated November 18, 2005, resetting said matter for trial on May 18 and 19, 2006, at 8:30 A.M.

19. That on November 18, 2005, a Review Hearing was held in the related [CHINS] proceedings . . . which Hearing was personally attended by [Mother]. Further, that during the course of said Review Hearing, [Mother] was notified that the trial on the Involuntary Termination Of Parental Rights was scheduled for May 18 and 19, 2006.

* * *

21. That [Mother], notwithstanding having been notified of the May 18 and 19, 2006[,] trial dates, did not appear in Court or her Attorney's office prior to, during or anytime after said trial dates to check on or learn about anything that might have happened or occurred during said scheduled trials, or to otherwise check on the status of the case.

22. That at the Pre-Trial Conference held February 10, 1006, [Mother's] attorney . . . orally moved the Court to continue the trial on the termination of parental rights from May 18 and 19, 2006, to the date of May 16 and 17, 2006, which Motion was granted.

23. That between May 19, 2003[,] and May 16, 2006, the DCS had been provided with or otherwise obtained a number of different addresses where [Mother] <u>might</u> be living or <u>might</u> be staying but that the last <u>known</u> address for or residence of [Mother] was 7250 Co. Rd. 49, Spencerville, DeKalb County, Indiana.

24. That on or about March 10, 2006, the DCS mailed to [Mother], by certified mail, return receipt requested, notice of the May 16 and 17, 2006, trial date on said Petition For Termination Of Parental Rights and that said notice was returned, undelivered.

> 25. That [Mother] has not kept in contact with her attorney or the DCS nor has she provided the Court, DCS, or her Attorney with a current mailing address or other contact information as required by her Case Plan.
>
> 26. That the DCS notified [Mother], by publication in the Evening Star, a newspaper of general circulation in DeKalb County, Indiana, of the May 16 and 17, 2006, trial on the termination of parental rights, which notice appeared in said newspaper on the 14th, 21st, and 28th days of March, 2006.
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> 27. That [Mother] was properly served with notice of the trial of the termination of parental rights scheduled for May 16 and 17, 2006.
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> * * *
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> 31. That [Mother] failed to appear for the trial regarding the termination of her parental rights and that her attorney, . . . the DCS, . . . and others have not had contact with [Mother] since at least January[] 2006.

Appellant's App. at 47-54.

During the termination proceeding, Mother's counsel repeatedly moved for, and was denied, a continuance based on Mother's absence. Nonetheless, Mother's counsel continued to represent Mother at the hearing. The court then generally concluded that Mother had been properly served with notice of the proceeding on the termination of her parental rights, and it granted the DCS's petition to terminate her rights with respect to A.H. This appeal ensued.

DISCUSSION AND DECISION

The trial court entered special findings of fact and conclusions thereon. We must determine, therefore, whether the evidence supports the findings and whether the findings support the judgment. Truelove v. Truelove, 855 N.E.2d 311, 314 (Ind. Ct. App. 2006). Neither the findings nor the judgment will be set aside unless they are clearly erroneous. Id. Findings of fact are clearly erroneous if the record lacks any

evidence or reasonable inferences to support them. Id. A judgment is clearly erroneous when it is unsupported by the findings and the conclusions relying on the findings. Id.

Mother contends that she lacked proper notice that the termination proceeding would occur on May 16-17, 2006. Specifically, Mother maintains that the notice informing her of the final date of the termination hearing was defective under Indiana Code Section 31-35-2-6.5 and that, in addition, the DCS's attempts to notify her via publication were insufficient. Mother does not dispute that, if she was properly notified of the termination proceeding, the DCS adequately met its burdens to terminate her parental rights with respect to A.H.

Although in most cases knowledge of an attorney is imputed to the client, see, e.g., Houchins v. Kittle's Home Furnishings, 589 N.E.2d 1190, 1195 (Ind. Ct. App. 1992), trans. denied, that general rule does not apply to termination proceedings. Rather, based on the statutory requirements the DCS is required to serve notice on a parent in addition to the parent's attorney. In re D.L.M., 725 N.E.2d 981, 983 (Ind. Ct. App. 2000). Specifically, Indiana Code Section 31-35-2-6.5 states, in pertinent part:

> (b) At least ten (10) days before a hearing on a petition or motion under this chapter[,] the person or entity who filed the petition to terminate the parent-child relationship . . . shall send notice of the review to the persons listed in subsections (c) and (d).
>
> (c) [T]he following persons shall receive notice of a hearing on a petition or motion filed under this chapter:
>
> (1) The child's parent, guardian, or custodian.
>
> (2) An attorney who has entered an appearance on behalf of the child's parent, guardian, or custodian.

"Compliance with the statutory procedure of the juvenile code is mandatory to effect a termination of parental rights[.]" In re T.W., 831 N.E.2d 1242, 1246 (Ind. Ct. App. 2005) (quoting Styck v. Karnes, 462 N.E.2d 1327, 1329 (Ind. Ct. App. 1984)). Statutory notice is a procedural precedent that must be performed prior to commencing an action. Id.

The conclusion that a parent is entitled to notice separate from that given to his or her attorney is further supported by the heightened principles of due process in termination hearings. In re D.L.M., 725 N.E.2d at 983. The parent-child relationship is one of the most valued relationships in our culture. See Browder v. Harmeyer, 453 N.E.2d 301, 308 (Ind. Ct. App. 1983) (stating that the relationship "is so special that it alone of all familial connections has a special procedure whereby affected parties must be accorded certain proceedings before rights thereto can be terminated"). Termination proceedings are comparable to criminal proceedings, as was expressed by our legislature when it granted parents in termination proceedings the right to counsel. See Ind. Code § 31-32-2-5 (West 2004). In a termination hearing, it is the parent whose substantial rights are at stake. Accordingly, notice of the termination hearing must be given to the parent himself or herself and not simply to the parent's attorney. In re D.L.M., 725 N.E.2d at 983.

Nonetheless, to comply with the notice requirements of Indiana Code Section 31-35-2-6.5, one need only meet the requirements of Trial Rule 5, which authorizes service by mail and provides that service shall be made on a party at the party's last known address. In re C.C., 788 N.E.2d 847, 851 (Ind. Ct. App. 2003). As we have stated:

> While service of process [provided for under Trial Rule 4] serves to provide notice of the proceeding, it has a constitutional component and is a prerequisite to jurisdiction. The notice of the hearing which is required by IC 31-35-2-6.5 is a statutory procedural requirement which does not rise to constitutional dimension. Paragraph (b) of the statute provides that the petitioner shall "send notice." It does not provide for service of process. Trial Rules 4 to 4.17 govern service of process. Rule 5 governs service of subsequent papers and pleadings in the action; Trial Rule 5(B) sets out how service can be accomplished. Trial Rule 5(B)(2) specifically authorizes service by mail.
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> * * *
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> No constitutional, statutory, or procedural provision requires service of the notice of the hearing to rise to the same level as service of process. To impose such a requirement would permit a parent or other party entitled to notice to frustrate the process by failing to provide a correct address and would add unnecessarily to the expense and delay in termination proceedings when existing provisions adequately safeguard a parent's due process rights.

In re A.C., 770 N.E.2d 947, 950 (Ind. Ct. App. 2002) (emphasis added).

As an initial matter, insofar as the parties dispute whether the DCS met the requirements of due process by attempting to inform Mother of the continued hearing date by publication, we do not consider that issue. Publication is used to effect legal service of process on parties pursuant to Trial Rule 4.13. But, again, "[t]he notice of the hearing which is required by IC 31-35-2-6.5 is a statutory procedural requirement which does not rise to constitutional dimension." Id. And "[c]ompliance with the statutory procedure of the juvenile code is mandatory to effect a termination of parental rights[.]" In re T.W., 831 N.E.2d at 1246. As such, whether the DCS complied with the constitutional requirements of service of process has no bearing on whether it complied with the statutory requirement that notice of the date of a termination proceeding be sent

to a parent pursuant to Trial Rule 5. See In re C.C., 788 N.E.2d at 851; In re A.C., 770 N.E.2d at 950.

Here, the trial court specifically found that "the last known address for or residence of [Mother] was 7250 Co. Rd. 49, Spencerville, DeKalb County, Indiana." Appellant's App. at 52. The DCS does not dispute that finding. The trial court then found "[t]hat on or about March 10, 2006, the DCS mailed to [Mother], by certified mail, return receipt requested, notice of the May 16 and 17, 2006, trial date . . . and that said notice was returned, undelivered." Id. at 52-53. The evidence submitted on appeal demonstrates that the March 10, 2006, notice mailed by the DCS to Mother was mailed to the "Lindenview Regional Behavioral Center, Parkview Behavioral" at 1909 Carew Street in Fort Wayne.[1] Id. at 33. Hence, the notice that the DCS mailed to Mother was not mailed to the address the trial court found to be the last known address for Mother. Pursuant to Trial Rule 5, "[s]ervice upon the . . . party shall be made by delivering or mailing a copy of the papers to him at his last known address." Ind. Trial Rule 5(B). Indiana Code Section 31-35-2-6.5 requires compliance with Trial Rule 5. See In re C.C., 788 N.E.2d at 851. As such, the DCS failed to give Mother the notice to which she was statutorily entitled by not sending that notice to her last known address, and the trial court's judgment is clearly erroneous as it is unsupported by its findings. See Truelove, 855 N.E.2d at 314.

[1] Throughout its brief, the DCS refers to pages of the transcript that would seem to refute this evidence, but those pages do not exist. For example, on pages two and nine of its appellate brief, the DCS cites to pages 842 and 843 of the transcript. But the certified transcript ends at page 718. Thus, we do not consider those arguments. In any event, the DCS makes no reference that it made any other certified mailing on March 10.

Again, based on the heightened protections afforded parents in termination proceedings, Mother was statutorily entitled to service of the notice of the continued hearing date as described by Indiana Code Section 31-35-2-6.5 and Trial Rule 5. Although it is undisputed that Mother had actual notice of both the original March 21-22, 2006, hearing dates and the continued May 18-19 dates, that notice expired when the hearing was moved to May 16-17. See In re C.C., 788 N.E.2d at 850-52. As the DCS did not send notice to Mother's last known address following the most recent change in the hearing date, we must reverse the termination of her parental rights.

Reversed.

RILEY, J., and BARNES, J., concur.